

Calendar No. 316

114TH CONGRESS
1ST SESSION

S. 2044

[Report No. 114-175]

To prohibit the use of certain clauses in form contracts that restrict the ability of a consumer to communicate regarding the goods or services offered in interstate commerce that were the subject of the contract, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 16, 2015

Mr. THUNE (for himself, Mr. SCHATZ, Mr. MORAN, Mr. BLUMENTHAL, Mrs. McCASKILL, Mr. NELSON, Mr. DAINES, and Mr. BOOKER) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

DECEMBER 8, 2015

Reported by Mr. THUNE, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To prohibit the use of certain clauses in form contracts that restrict the ability of a consumer to communicate regarding the goods or services offered in interstate commerce that were the subject of the contract, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Consumer Review
5 Freedom Act of 2015”.

6 **SEC. 2. CONSUMER REVIEW PROTECTION.**

7 (a) **DEFINITIONS.**—In this section:

8 (1) **COMMISSION.**—The term “Commission”
9 means the Federal Trade Commission.

10 (2) **COVERED COMMUNICATION.**—The term
11 “covered communication” means a written, verbal,
12 or pictorial review, performance assessment of, or
13 other similar analysis of, the products, services, or
14 conduct of a person by an individual who is party to
15 a form contract with respect to which such person
16 is also a party.

17 (3) **FORM CONTRACT.**—The term “form con-
18 tract” means a standardized contract used by a per-
19 son and imposed on an individual without a mean-
20 ingful opportunity for such individual to negotiate
21 the standardized terms, but does not include a con-
22 tract establishing an employer-employee or inde-
23 pendent contractor relationship.

1 (4) PICTORIAL.—The term “pictorial” includes
2 pictures, photographs, and video provided by elec-
3 tronic means.

4 (5) VERBAL.—The term “verbal” includes
5 speech provided by electronic means.

6 (6) WRITTEN.—The term “written” includes
7 words provided by electronic means.

8 (b) INVALIDITY OF CONTRACTS THAT IMPEDE CON-
9 SUMER REVIEWS.—

10 (1) IN GENERAL.—Except as provided in para-
11 graphs (2) and (3), a provision of a form contract
12 is void from the inception of such contract if such
13 provision—

14 (A) prohibits or restricts the ability of an
15 individual who is a party to the form contract
16 to engage in a covered communication;

17 (B) imposes a penalty or fee against an in-
18 dividual who is a party to the form contract for
19 engaging in a covered communication; or

20 (C) transfers or requires an individual who
21 is a party to the form contract to transfer to
22 any person any intellectual property rights that
23 the individual may have in any otherwise lawful
24 covered communication about such person or
25 the goods or services provided by such person.

1 (2) RULE OF CONSTRUCTION.—Nothing in
2 paragraph (1) shall be construed to affect—

3 (A) any duty of confidentiality imposed by
4 law (including agency guidance); or
5 (B) any civil action for defamation, libel,
6 or slander, or any similar cause of action.

7 (3) EXCEPTIONS.—Paragraph (1) shall not
8 apply to the extent that a provision of a form con-
9 tract prohibits disclosure of the following:

10 (A) Trade secrets or commercial or finan-
11 cial information obtained from a person and
12 considered privileged or confidential.

13 (B) Personnel and medical files and simi-
14 lar information the disclosure of which would
15 constitute a clearly unwarranted invasion of
16 personal privacy.

17 (C) Records or information compiled for
18 law enforcement purposes, the disclosure of
19 which would constitute a clearly unwarranted
20 invasion of personal privacy.

21 (e) PROHIBITION.—It shall be unlawful for a person
22 to offer or enter into a form contract containing a provi-
23 sion described as void in subsection (b).

24 (d) ENFORCEMENT BY COMMISSION.—

1 (1) UNFAIR OR DECEPTIVE ACTS OR PRACTICES.—A violation of subsection (e) by a person
2 with respect to which the Commission is empowered
3 under section 5(a)(2) of the Federal Trade Commission Act (15 U.S.C. 45(a)(2)) shall be treated as a
4 violation of a rule defining an unfair or deceptive act
5 or practice prescribed under section 18(a)(1)(B) of
6 the Federal Trade Commission Act (15 U.S.C.
7 57a(a)(1)(B)).

8 (2) POWERS OF COMMISSION.—

9 (A) IN GENERAL.—The Commission shall
10 enforce this section in the same manner, by the
11 same means, and with the same jurisdiction,
12 powers, and duties as though all applicable
13 terms and provisions of the Federal Trade
14 Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this Act.

15 (B) PRIVILEGES AND IMMUNITIES.—Any
16 person who violates this section shall be subject
17 to the penalties and entitled to the privileges
18 and immunities provided in the Federal Trade
19 Commission Act (15 U.S.C. 41 et seq.).

20 (e) ENFORCEMENT BY STATES.—

21 (1) IN GENERAL.—In any case in which the attorney general of a State has reason to believe that

1 an interest of the residents of the State has been or
2 is threatened or adversely affected by the engage-
3 ment of any person subject to subsection (e) in a
4 practice that violates such subsection, the attorney
5 general of the State may, as parens patriae, bring
6 a civil action on behalf of the residents of the State
7 in an appropriate district court of the United States
8 to obtain appropriate relief.

9 (2) RIGHTS OF FEDERAL TRADE COMMISSION
10 SION—

(ii) CONTENTS.—The notification required by clause (i) with respect to a civil action shall include a copy of the complaint to be filed to initiate the civil action.

1 vide the notification required by clause (i)
2 before initiating a civil action under para-
3 graph (1), the attorney general shall notify
4 the Commission immediately upon insti-
5 tuting the civil action.

6 **(B) INTERVENTION BY FEDERAL TRADE**

7 **COMMISSION.**—The Commission may—

8 (i) intervene in any civil action
9 brought by the attorney general of a State
10 under paragraph (1) against a person de-
11 scribed in subsection (d)(1); and

12 (ii) upon intervening—

13 (I) be heard on all matters aris-
14 ing in the civil action; and

15 (II) file petitions for appeal of a
16 decision in the civil action.

17 **(3) INVESTIGATORY POWERS.**—Nothing in this
18 subsection may be construed to prevent the attorney
19 general of a State from exercising the powers con-
20 ferred on the attorney general by the laws of the
21 State to conduct investigations, to administer oaths
22 or affirmations, or to compel the attendance of wit-
23 nesses or the production of documentary or other
24 evidence.

1 (4) PREEMPTIVE ACTION BY FEDERAL TRADE
2 COMMISSION.—If the Federal Trade Commission in-
3 stitutes a civil action or an administrative action
4 with respect to a violation of subsection (e), the at-
5 torney general of a State may not, during the pend-
6 ency of such action, bring a civil action under para-
7 graph (1) against any defendant named in the com-
8 plaint of the Commission for the violation with re-
9 spect to which the Commission instituted such ac-
10 tion.

11 (5) VENUE; SERVICE OF PROCESS.—

12 (A) VENUE.—Any action brought under
13 paragraph (1) may be brought in—

14 (i) the district court of the United
15 States that meets applicable requirements
16 relating to venue under section 1331 of
17 title 28, United States Code; or

18 (ii) another court of competent juris-
19 diction.

20 (B) SERVICE OF PROCESS.—In an action
21 brought under paragraph (1), process may be
22 served in any district in which the defendant—
23 (i) is an inhabitant; or
24 (ii) may be found.

25 (6) ACTIONS BY OTHER STATE OFFICIALS.—

1 (A) IN GENERAL.—In addition to civil ac-
2 tions brought by attorneys general under para-
3 graph (1), any other officer of a State who is
4 authorized by the State to do so may bring a
5 civil action under paragraph (1), subject to the
6 same requirements and limitations that apply
7 under this subsection to civil actions brought by
8 attorneys general.

9 (B) SAVINGS PROVISION.—Nothing in this
10 subsection may be construed to prohibit an au-
11 thorized official of a State from initiating or
12 continuing any proceeding in a court of the
13 State for a violation of any civil or criminal law
14 of the State.

15 (7) PROHIBITION ON ENTERING INTO CONTIN-
16 GENCY FEE AGREEMENT WITH OUTSIDE COUNSEL
17 FOR STATE ENFORCEMENT.—

18 (A) CONTINGENCY FEE AGREEMENT DE-
19 FINED.—For purposes of this paragraph, the
20 term “contingency fee agreement” means a con-
21 tract or other agreement to provide services
22 under which the amount or the payment of the
23 fee for services is contingent in whole or in part
24 on the outcome of the matter for which the
25 services were obtained.

1 (B) PROHIBITION.—An attorney general of
2 a State, or any State or local law enforcement
3 agency, may not enter into a contingency fee
4 agreement for legal or expert witness services
5 relating to an action commenced under para-
6 graph (1).

7 (f) EDUCATION AND OUTREACH FOR BUSINESSES.—
8 Not later than 60 days after the date of the enactment
9 of this Act, the Commission shall commence conducting
10 education and outreach that provides businesses with non-
11 binding best practices for compliance with this Act.

12 (g) RELATION TO STATE CAUSES OF ACTION.—
13 Nothing in this section shall be construed to affect any
14 cause of action brought by a person that exists or may
15 exist under State law.

16 (h) EFFECTIVE DATES.—This section shall take ef-
17 feet on the date of the enactment of this Act, except
18 that—

19 (1) subsections (b) and (e) shall apply with re-
20 spect to contracts in effect on or after the date of
21 the enactment of this Act; and

22 (2) subsections (d) and (e) shall apply with re-
23 spect to contracts in effect on or after the date that
24 is 1 year after the date of the enactment of this Act.

1 **SECTION 1. SHORT TITLE.**

2 *This Act may be cited as the “Consumer Review Free-*
3 *dom Act of 2015”.*

4 **SEC. 2. CONSUMER REVIEW PROTECTION.**

5 (a) **DEFINITIONS.**—*In this section:*

6 (1) **COMMISSION.**—*The term “Commission”*
7 *means the Federal Trade Commission.*

8 (2) **COVERED COMMUNICATION.**—*The term “cov-*
9 *ered communication” means a written, oral, or pic-*
10 *torial review, performance assessment of, or other*
11 *similar analysis of, including by electronic means, the*
12 *goods, services, or conduct of a person by an indi-*
13 *vidual who is party to a form contract with respect*
14 *to which such person is also a party.*

15 (3) **FORM CONTRACT.**—

16 (A) **IN GENERAL.**—*Except as provided in*
17 *subparagraph (B), the term “form contract”*
18 *means a contract with standardized terms—*

19 (i) *used by a person in the course of*
20 *selling or leasing the person’s goods or serv-*
21 *ices; and*

22 (ii) *imposed on an individual without*
23 *a meaningful opportunity for such indi-*
24 *vidual to negotiate the standardized terms.*

1 (B) *EXCEPTION.*—The term “form contract”
2 *does not include an employer-employee or inde-*
3 *pendent contractor contract.*

4 (4) *PICTORIAL.*—The term “pictorial” includes
5 *pictures, photographs, video, illustrations, and sym-*
6 *bols.*

7 (b) *INVALIDITY OF CONTRACTS THAT IMPEDE CON-*
8 *SUMER REVIEWS.*—

9 (1) *IN GENERAL.*—Except as provided in para-
10 *graphs (2) and (3), a provision of a form contract is*
11 *void from the inception of such contract if such provi-*
12 *sion—*

13 (A) *prohibits or restricts the ability of an*
14 *individual who is a party to the form contract*
15 *to engage in a covered communication;*

16 (B) *imposes a penalty or fee against an in-*
17 *dividual who is a party to the form contract for*
18 *engaging in a covered communication; or*

19 (C) *transfers or requires an individual who*
20 *is a party to the form contract to transfer to any*
21 *person any intellectual property rights in review*
22 *or feedback content, with the exception of a non-*
23 *exclusive license to use the content, that the indi-*
24 *vidual may have in any otherwise lawful covered*

1 *communication about such person or the goods or*
2 *services provided by such person.*

3 *(2) RULE OF CONSTRUCTION.—Nothing in para-*
4 *graph (1) shall be construed to affect—*

5 *(A) any duty of confidentiality imposed by*
6 *law (including agency guidance);*

7 *(B) any civil action for defamation, libel, or*
8 *slander, or any similar cause of action;*

9 *(C) any party's right to remove or refuse to*
10 *publish any statement on an Internet website*
11 *owned or operated by such party that contains*
12 *the personal information or likeness of another*
13 *person or is libelous, harassing, abusive, obscene,*
14 *vulgar, sexually explicit, inappropriate with re-*
15 *spect to race, gender, sexuality, ethnicity, or*
16 *other intrinsic characteristic, or that is unrelated*
17 *to the goods or services offered by such party; or*

18 *(D) a party's right to establish terms and*
19 *conditions with respect to the creation of photo-*
20 *graphs or video of such party's property when*
21 *those photographs or video are created by an em-*
22 *ployee or independent contractor of a commercial*
23 *entity and solely intended for commercial pur-*
24 *poses by that entity.*

1 (3) *EXCEPTIONS.*—Paragraph (1) shall not
2 apply to the extent that a provision of a form con-
3 tract prohibits disclosure of the following:

4 (A) *Trade secrets or commercial or finan-*
5 *cial information obtained from a person and*
6 *considered privileged or confidential.*

7 (B) *Personnel and medical files and similar*
8 *information the disclosure of which would con-*
9 *stitute a clearly unwarranted invasion of per-*
10 *sonal privacy.*

11 (C) *Records or information compiled for*
12 *law enforcement purposes, the disclosure of which*
13 *would constitute a clearly unwarranted invasion*
14 *of personal privacy.*

15 (c) *PROHIBITION.*—It shall be unlawful for a person
16 to offer or enter into a form contract containing a provision
17 described as void in subsection (b).

18 (d) *ENFORCEMENT BY COMMISSION.*—

19 (1) *UNFAIR OR DECEPTIVE ACTS OR PRAC-*
20 *TICES.*—A violation of subsection (c) by a person with
21 respect to which the Commission is empowered under
22 section 5(a)(2) of the Federal Trade Commission Act
23 (15 U.S.C. 45(a)(2)) shall be treated as a violation of
24 a rule defining an unfair or deceptive act or practice

1 prescribed under section 18(a)(1)(B) of the Federal
2 Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

3 (2) *POWERS OF COMMISSION.*—

4 (A) *IN GENERAL.*—The Commission shall
5 enforce this section in the same manner, by the
6 same means, and with the same jurisdiction,
7 powers, and duties as though all applicable
8 terms and provisions of the Federal Trade Com-
9 mission Act (15 U.S.C. 41 et seq.) were incor-
10 porated into and made a part of this Act.

11 (B) *PRIVILEGES AND IMMUNITIES.*—Any
12 person who violates this section shall be subject
13 to the penalties and entitled to the privileges and
14 immunities provided in the Federal Trade Com-
15 mission Act (15 U.S.C. 41 et seq.).

16 (e) *ENFORCEMENT BY STATES.*—

17 (1) *AUTHORIZATION.*—Subject to subparagraph
18 (B), in any case in which the attorney general of a
19 State has reason to believe that an interest of the resi-
20 dents of the State has been or is threatened or ad-
21 versely affected by the engagement of any person sub-
22 ject to subsection (c) in a practice that violates such
23 subsection, the attorney general of the State may, as
24 parens patriae, bring a civil action on behalf of the

1 *residents of the State in an appropriate district court*
2 *of the United States to obtain appropriate relief.*

3 (2) *RIGHTS OF FEDERAL TRADE COMMISSION.—*

4 (A) *NOTICE TO FEDERAL TRADE COMMISSION.—*

5 (i) *IN GENERAL.—Except as provided*
6 *in clause (iii), the attorney general of a*
7 *State shall notify the Commission in writing*
8 *that the attorney general intends to*
9 *bring a civil action under paragraph (1)*
10 *before initiating the civil action against a*
11 *person described in subsection (d)(1).*

12 (ii) *CONTENTS.—The notification re-*
13 *quired by clause (i) with respect to a civil*
14 *action shall include a copy of the complaint*
15 *to be filed to initiate the civil action.*

16 (iii) *EXCEPTION.—If it is not feasible*
17 *for the attorney general of a State to pro-*
18 *vide the notification required by clause (i)*
19 *before initiating a civil action under para-*
20 *graph (1), the attorney general shall notify*
21 *the Commission immediately upon insti-*
22 *tuting the civil action.*

23 (B) *INTERVENTION BY FEDERAL TRADE*
24 *COMMISSION.—The Commission may—*

1 (i) intervene in any civil action
2 brought by the attorney general of a State
3 under paragraph (1) against a person de-
4 scribed in subsection (d)(1); and

5 (ii) upon intervening—

6 (I) be heard on all matters arising
7 in the civil action; and
8 (II) file petitions for appeal of a
9 decision in the civil action.

10 (3) *INVESTIGATORY POWERS.*—Nothing in this
11 subsection may be construed to prevent the attorney
12 general of a State from exercising the powers con-
13 ferred on the attorney general by the laws of the State
14 to conduct investigations, to administer oaths or affir-
15 mations, or to compel the attendance of witnesses or
16 the production of documentary or other evidence.

17 (4) *PREEMPITIVE ACTION BY FEDERAL TRADE*
18 *COMMISSION.*—If the Federal Trade Commission in-
19 stitutes a civil action or an administrative action
20 with respect to a violation of subsection (c), the attor-
21 ney general of a State may not, during the pendency
22 of such action, bring a civil action under paragraph
23 (1) against any defendant named in the complaint of
24 the Commission for the violation with respect to
25 which the Commission instituted such action.

1 (5) *VENUE; SERVICE OF PROCESS.*—2 (A) *VENUE.*—Any action brought under
3 paragraph (1) may be brought in—4 (i) the district court of the United
5 States that meets applicable requirements
6 relating to venue under section 1391 of title
7 28, *United States Code*; or
8 (ii) another court of competent juris-
9 diction.10 (B) *SERVICE OF PROCESS.*—In an action
11 brought under paragraph (1), process may be
12 served in any district in which the defendant—13 (i) is an inhabitant; or
14 (ii) may be found.15 (6) *ACTIONS BY OTHER STATE OFFICIALS.*—16 (A) *IN GENERAL.*—In addition to civil ac-
17 tions brought by attorneys general under para-
18 graph (1), any other officer of a State who is au-
19 thorized by the State to do so may bring a civil
20 action under paragraph (1), subject to the same
21 requirements and limitations that apply under
22 this subsection to civil actions brought by attor-
23 neys general.24 (B) *SAVINGS PROVISION.*—Nothing in this
25 subsection may be construed to prohibit an au-

1 *thorized official of a State from initiating or
2 continuing any proceeding in a court of the
3 State for a violation of any civil or criminal law
4 of the State.*

5 *(f) EDUCATION AND OUTREACH FOR BUSINESSES.—
6 Not later than 60 days after the date of the enactment of
7 this Act, the Commission shall commence conducting edu-
8 cation and outreach that provides businesses with non-bind-
9 ing best practices for compliance with this Act.*

10 *(g) RELATION TO STATE CAUSES OF ACTION.—Noth-
11 ing in this section shall be construed to affect any cause
12 of action brought by a person that exists or may exist under
13 State law.*

14 *(h) EFFECTIVE DATES.—This section shall take effect
15 on the date of the enactment of this Act, except that—*

16 *(1) subsections (b) and (c) shall apply with re-
17 spect to contracts in effect on or after the date that
18 is 90 days after the date of the enactment of this Act;
19 and*

20 *(2) subsections (d) and (e) shall apply with re-
21 spect to contracts in effect on or after the date that
22 is 1 year after the date of the enactment of this Act.*

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[Report No. 114-175]

A BILL

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DECEMBER 8, 2015

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